

March 9, 2004

Delivered via electronic mail: regs.comments@federalreserve.gov

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System

Re: Proposed Rule, Regulation CC 12 CFR Part 229
Docket Number R-1176

Attached are comments to the Board's of Governors proposed rule from Capitol Bancorp Limited.

Section 2 Proposed Definitions Subsection h "Sufficient Copy and Copy." §229.2(aaa)

The Board proposes to define the terms sufficient copy and copy in subsection h of section 2 regarding proposed new definitions. These copies are anticipated to be provided upon requests from various sources regarding liabilities for losses incurred from the receipt of substitute checks. The Board states that it proposes to define a copy to be "a paper reproduction of a check."

Our recommendation would be that the definition follow the definition put forth in the Check 21 act at sections 6(d)(1), 7(c)(1)(B), 8(c)(1)(A), and 7(f)(1)(A). Such definition should read: "A copy of the original check (including an image or a substitute check) that accurately represents all of the information on the front and back of the original check (as of the time the original check was truncated) or is otherwise sufficient to determine whether or not a claim is valid."

Because the statute in each of the above referenced sections includes in the definition the possibility that the indemnifying bank can provide an "image" as a copy, the rule should permit the bank to make an electronic image presentation, and if necessary to avoid confusion, the board may qualify that statement within that section by explaining that in order for an image to qualify as a copy the recipient must have agreed to receive that information electronically.

The scheme would be in lieu of the general scheme of § 229.58 of the proposed rules. It should be clear throughout the regulation that electronic delivery of images is sufficient for any purpose between parties that have agreed to receive that information electronically. The commenter's request would be for the board to explore the clarity of the §229.58 scheme as compared to the possibility of providing that electronic transfers are permitted at each section where such transfer is permissible.

Subsection j of Section 2. The definition of truncate and its commentary would highlight that removal of a substitute check is not truncation because truncation refers only to original checks. The Board should address in the commentary the situation in which there may be multiple reconverting banks if the check moves from electronic form to substitute check form multiple times, but that there is still only one truncating bank. It should be explicit in the rules that the warranties travel to the bank causing the error resulting in a claim for loss. Therefore the truncating bank may not be at all liable if a bank reconverts a substitute check down the line even if the original truncating bank altered the check when it truncated the check. The Board could state that liability could be given back to the truncating bank by agreement.

Section F. Subsection 1. Content and Provision of the Substitute Check Warranties.

The Board has requested comment on how Reg CC should handle situations where a second charge on a check results from an ACH debit that was created using information from an original check or substitute check. The warranties provided should continue to the ACH debit entry representing request for payment on the check. We anticipate several types of instances where individuals will attempt to fraudulently create substitute checks, or other requests for payments based on truncated checks, either through Image Replacement Documents, ACH debit entries, or simply forged substitute checks (whether a forgery of an original check, or forged and transfer of check still being presented electronically). The regulations should be clear as to where a bank suffering loss due to a fraudulent ACH debit entry of a substitute check may go for recovery, whether such protection is contained in and will remain in regulation E, or is provided for in connection with the warranties governing transfer of substitute checks.

§ 229.54(c)(4) of the proposed rule permits the bank to reverse both the amount it previously recredited plus any interest that it has paid on that amount. The Board has specifically requested comment on the appropriateness of this proposed reversal of the interest credit. It is this commenter's opinion that such regulation permitting reversal of the interest credit is wholly appropriate. The account holder should not be permitted to make an invalid claim, and reap the benefits of interest while the bank investigates the validity of such a claim. Simple equity seems to dictate that any interest provided to the customer should be returned to the bank if such a claim is determined to be invalid.

§ 229.57 In response to the Board's request regarding when a disclosure in response to a specific request for a copy of a check should be required, it should be noted that if alternative A is chosen then the disclosure should indicate that the Bank may provide a substitute check instead of the original check. By making that alternative non committal or otherwise indicate the consumer that it could possibly, but not necessarily receive a substitute check in its disclosure then it complies with the notice requirement of the statute, but also alleviates a danger for consumer confusion if the Bank ultimately provides an original check. Admittedly alternative B is the clearer of the two alternatives and makes the most sense in terms of clearly notifying consumers that they are receiving a substitute check in response to their request, but that would not comply with the statute. The commentator recommends that the Board adopt an updated version of alternative A, that makes explicit that the consumer may but will not necessarily receive a substitute check in response to its request at the time of the consumer's request.

This commenter generally approves of the Board's attempt to incorporate the Check 21 Act into Subpart D nearly verbatim. The significant amount of the act that remains unchanged throughout subpart D lends clarity to the comparison and reading of the Act and implementation of Regulation CC.